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No. 05-547

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IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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No one disputes that simple possession of a controlled substance is not "illicit trafficking" as that term is ordinarily understood and used in federal statutes. This case thus turns on whether a "drug trafficking crime," which is defined as "any felony punishable under the Controlled Substances Act," 18 U.S.C. § 924(c), plainly includes "any misdemeanor punishable under the Controlled Substances Act" that is punishable as a felony under state law. The straightforward answer to this question is "no." The government's interpretation strains the statutory language and disregards established rules of statutory construction. The government's original interpretation, to which it adhered for more than a decade, is correct: a drug offense is an "aggravated felony" for immigration purposes if it involves illicit trafficking or the defendant's actions are a felony under the Controlled Substances Act (or two other federal drug statutes).

I. A Simple Possession Offense Punishable As A Misdemeanor Under The Controlled Substances Act Is Neither "Illicit Trafficking" Nor "A Drug Trafficking Crime."

A. The Ordinary Meaning Of "Illicit Trafficking" Does Not Include Simple Possession Offenses.

The Immigration and Nationality Act defines an "aggravated felony" to include "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(B). Simple possession of a controlled substance is not "illicit trafficking" as that term is ordinarily defined. *See, e.g.*, Black's Law Dictionary 1534 (8th ed. 2004) ("traffic" means "[t]o trade or deal in goods esp. illicit drugs or other contraband); 21 U.S.C. § 862 (defining "traffickers"

as individuals "convicted of any Federal or State offense consisting of the distribution of controlled substances"); *see generally* Lopez Br. 18-20.[1] No court has held, and the government does not argue, that simple possession offenses are "illicit trafficking" within the usual meaning of that term. Thus, Lopez's simple possession offense is not an aggravated felony unless it is a "drug trafficking crime" as defined in 18 U.S.C. § 924(c).[2]

B. A "Drug Trafficking Crime" Is Conduct That Violates A Felony Provision Of The Federal Drug Laws.

Section 924(c) of Title 18 is a criminal statute, not an immigration statute. It defines the substantive offense of using or carrying a firearm during or in relation to a "drug trafficking crime" or a "crime of violence." It provides: "For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act" or two other federal drug statutes. 18 U.S.C. § 924(c)(2). The most natural reading of this language is that a "drug trafficking crime" is an offense that is punishable as a felony under the

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[1] Federal law prohibits both illicit trafficking and simple possession, but distinguishes between the two types of offenses and punishes trafficking offenses more severely. *Compare, e.g.*, 21 U.S.C. § 841 *with id.* § 844. This case involves a simple possession offense rather than a trafficking offense. J.A. 16, 20-21. Lopez aided and abetted possession by a third party, Juan Valdez, by telling Valdez where he could obtain drugs. Pet. App. 13a. After Valdez was arrested, Lopez loaned $600 to Valdez's brother, at the brother's request, to post bond for Valdez. Juan Valdez later returned the money to Lopez. Police then searched Lopez's residence and found the $600 but no drugs. *Id.*

[2] Petitioners' amici develop the argument that that non-trafficking offenses, including non-trafficking offenses punished as felonies under the CSA, are not "aggravated felonies" for purposes of the INA. *See, e.g.*, ABA Br. 8-10; Immigrant Defense Project Br. 6-28.

Controlled Substances Act. The government arrives at its interpretation by parsing the terms "any felony" and "punishable" in isolation. But the Court does not interpret words "in isolation"; doing so violates "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (citation omitted). The government's assertion (U.S. Br. 19) that "[n]o modifier" limits the phrase "any felony" in section 924(c) is plainly incorrect: "any felony" is modified and limited by the phrase "punishable under the Controlled Substances Act." It is not just "any felony" that is a drug trafficking crime, but a felony "punishable under the Controlled Substances Act." As shown below (pp. 5-12), state felony convictions are not "punishable" under the federal drug laws.

1. The government concedes that the Title 21 definition of "felony" does not apply.

One of the government's "plain language" arguments is easily dealt with, because the government itself now agrees that it is wrong. The government had argued that the term "felony" in section 924(c) must include state-law felonies because a provision of Title 21 provides: "As used in this subchapter . . . [t]he term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13). *See, e.g.*, *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 534 (7th Cir. 2006) ("the government points to the definitions section of the Controlled Substances Act."). The court of appeals accepted this argument, *see* Pet. App. 4a, as have other

courts that have adopted the government's interpretation.[3]

The government now agrees that it was wrong to make this argument, and the lower court was wrong to accept it. *See* U.S. Br. 25 ("We agree with Lopez . . . that the term 'felony' in Section 924(c)(2) takes its meaning from the framework of Title 18, rather than from Title 21."). The government also agrees with Lopez's reasons for this conclusion: By its terms, the Title 21 definition applies only to Title 21; Section 924(c) is a provision of Title 18, which classifies federal crimes as felonies or misdemeanors based upon the authorized term of imprisonment. *See* 18 U.S.C. § 3559. Moreover, neither section 924(c) nor the INA's aggravated felony provision incorporates the Title 21 definition of "felony." *See* Lopez Br. 25-27; U.S. Br. 25-27. The government adds that the Title 18 definition of "felony" is preferable because it "provides a level of uniformity to the definition of drug trafficking crime." *Id.* at 27.

Because the Title 21 definition of "felony" does not apply to section 924(c), it provides no support for the government's position that "felony" in section 924(c) includes state felonies as well as federal felonies.[4]

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[3] *See United States* v. *Palacios-Suarez*, 418 F.3d 692, 696 (6th Cir. 2005); *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 398 (B.I.A. 2002) (same).

[4] The government's recognition that uniformity is desirable undermines its position in this case. There is no dispute that federal law provides uniform definitions of "controlled substance," "punishable" offenses, and—the government now agrees—"felony." Having applied a uniform federal approach, and recognized that this approach is desirable, it makes little sense to depart from the uniform federal classification of Controlled Substances Act offenses into felonies and misdemeanors in favor of non-uniform state classifications of these offenses.

2. A state felony conviction (as opposed to the conduct underlying the conviction) is not "punishable under" federal drug laws.

The phrase "any felony under the Controlled Substances Act" plainly refers to a felony violation of that Act. Congress's addition of the word "punishable" ("any felony *punishable* under the Controlled Substances Act") specifies that an actual conviction (*i.e.*, punishment) under the Controlled Substances Act is not necessary. The addition of "punishable" does not expand the scope of "drug trafficking crime" to include misdemeanors under the Controlled Substances Act.

The government acknowledges that "the plain meaning of 'punishable under' the Controlled Substances Act is that the criminal *conduct* is susceptible to sanction under federal law." U.S. Br. 17 (emphasis in original). *See* Lopez Br. 24-25; *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 488 (1985) (acts "punishable under" federal law "consist[] not of acts for which the defendant has been convicted, but of acts for which he could be.") The government fails to recognize that the plain meaning of "punishable under" conflicts with its interpretation of section 924(c). As Judge Posner, writing for the Seventh Circuit, has explained, a violation of state drug laws is not *itself* "punishable under" the Controlled Substances Act. *See Gonzales-Gomez*, 441 F.3d at 534 ("The Controlled Substances Act does not purport to punish state drug felonies."). Rather, it is the *conduct* underlying the state law conviction that may be "punishable under" the act. Thus, the government's interpretation does not fit the statutory language.

The government does not respond directly to this argument, instead asserting (U.S. Br. 19) that "Petitioners cannot mean what they say" because they agree "that some state-law controlled substance

convictions qualify as convictions for 'drug trafficking crime[s].'" The government misstates Petitioners' argument. Petitioners do *not* agree that state-law convictions or state-law felonies are "punishable under the Controlled Substances Act." Instead, Petitioners' argument is that the *conduct* underlying a state-law conviction may be a drug trafficking crime if it could be punished as a felony under the Controlled Substances Act.

The government asserts (U.S. Br. 30) that Lopez's interpretation of section 924(c) is unprecedented because it "turns not on whether the offense is a 'felony' in the convicting jurisdiction, but rather on whether it would be a felony if prosecuted in a different jurisdiction (*i.e.*, under federal law)." The government's focus on the "convicting jurisdiction" is misplaced, because section 924(c) does not require or even refer to a drug trafficking "conviction." The government need only prove that the defendant committed a drug trafficking crime, not that he was convicted of the crime. *See United States* v. *Munoz-Fabela*, 896 F.2d 908, 910 (5th Cir. 1990); *United States* v. *Hunter*, 887 F.2d 1001, 1003 (9th Cir. 1989); U.S. Br. 17-18 & n.9.

Congress has shown that it knows how to refer to a "conviction," including a state-court conviction, when it wishes to do so. *See, e.g.*, 18 U.S.C. § 924(e)(1) (person who has "three previous convictions by any court referred to in section 922(g)(1) . . . for a violent felony or a serious drug offense"); *id.* § 922(g)(1) (person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year"). Congress used no such language in section 924(c), and thus the

government's "convicting jurisdiction" argument lacks a textual basis.[5]

3. Other provisions of section 924(c) confirm that a "drug trafficking crime" is a federal felony.

"The Court generally assume[s], in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome* v. *United States*, 318 U.S. 101, 104 (1943) (holding that the term "felony" in the federal bank robbery statute does not incorporate state law). Here, there is no "plain indication" that Congress intended to make the application of section 924(c) dependent on state law. To the contrary, the statute contains several indications that Congress had no such intention.

a. Section 924(c), by its terms, applies "to any crime of violence or drug trafficking crime . . . *for which the person may be prosecuted in a court of the United States*." 18 U.S.C. § 924(c)(1) (emphasis added). A person may be prosecuted in a court of the United States only for federal crimes, not state crimes. Accordingly, the Court has held that this language "expressly" limits "the phrase 'any crime' to only federal crimes." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *see also* U.S. Br. in *Gonzales* at 15 (section 924(c) "does not reach using or carrying a firearm during a state-law violation").

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[5] Even if section 924(c) did require a "conviction," Petitioner's interpretation is hardly unprecedented. Many States, in applying their recidivist sentencing statutes, look to whether a conviction would be a felony in the forum State rather than the convicting State. *See* Br. of Texas at 11, citing Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257, 269 (2005).

The government is thus driven to argue that, even though 924(c) is limited to federal-law violations, the definition of "drug trafficking crime" in section 924(c)(2)—considered in isolation—includes state-law violations. Again, however, courts do not interpret statutory phrases in isolation. Moreover, section 924(c)(2) defines "drug trafficking crime" "for purposes of this subsection." Congress is unlikely to have adopted a definition "for purposes of this subsection" that includes state-law violations. In addition, the INA's aggravated felony provision refers to a drug trafficking crime "as defined in section 924(c)" as a whole, not in "section 924(c)(2)." 8 U.S.C. § 1101(a)(43).

The government asserts (U.S. Br. 21-22) that the "court of the United States" language is surplusage unless it serves to limit the definition of "drug trafficking crime" to federal crimes. But an earlier version of section 924(c) included *both* the "court of the United States" language *and* a definition of "drug trafficking crime" that unquestionably was limited to federal crimes. *See* 18 U.S.C. § 924(c) (1982 & Supp. 1986). Moreover, the government itself offers an explanation of the "court of the United States" language: "Crimes of violence" are not defined by reference to specific federal criminal statutes, and therefore the reference to "crimes punishable in a court of the United States" serves to limit "crimes of violence" to federal crimes. U.S. Br. 22 n.15.

In any event, the government's proposed interpretation would *not* limit section 924(c) prosecutions to federal felonies. The government interprets "drug trafficking crime" to include any state felony that is punishable as misdemeanor under the Controlled Substances Act. Of course, defendants may be "prosecuted in a court of the United States" for federal misdemeanors. Thus, under the government's reading, section 924(c) criminalizes using and carrying a firearm

during a federal misdemeanor in a State that classifies the offense as a felony.[6]

b. A person who violates section 924(c) "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, . . . be sentenced to a term of imprisonment" ranging from "not less than 5 years" to life, depending upon circumstances specified in the statute. 18 U.S.C. 924(c)(1). Because the purpose of section 924(c) is to establish the minimum punishment imposed by federal courts for federal crimes, Congress clearly intended to refer to federal felonies—*i.e.*, felonies punishable by a federal court.

The government argues (U.S. Br. 29) that if Congress had intended to limit the definition of "drug trafficking crime" to felony violations of the Controlled Substances Act, it would have defined "drug trafficking crime" as "any felony punishable *as such* under the Controlled Substances Act." While the inclusion of "as such" would have provided Petitioner with an air-tight reading of § 924(c)(2), its omission does not support the government's "plain meaning" argument. Because § 924(c) deals only with the punishment of federal crimes by federal courts, "as such" was not necessary to clarify that state law felonies that are misdemeanors under the Controlled Substances Act are not "drug trafficking crime[s]."

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[6] Congress used the same definition of "drug trafficking crime" in section 929(a) of Title 18, and has incorporated the definition by reference in many other provisions of Title 18. *See* 18 U.S.C. §§ 929(a); 844(o) (referring solely to § 924(c)(2)); 1028(b)(3)(A) (referring solely to § 929(a)(2)); 1425(b); 1426(h); 1427; 1541; 1542; 1543; 1544; 1546(a); 1547(1); 4042(b)(3)(A). The government's interpretation would broaden the scope of these federal criminal offenses as well.

c. Elsewhere in section 924, Congress used exactly the same "punishable under the Controlled Substances Act" language, but added a separate, explicit reference to state law violations. *See* 18 U.S.C. § 924(g) ("conduct which . . . is punishable under the Controlled Substances Act" or "violates any State law relating to any controlled substance"); *id.* § 924(k) (same); *id.* § 924(e) "an offense under the Controlled Substances Act" or "an offense under State law"). The government's efforts to explain away these textual differences are unpersuasive. For example, it asserts that the term "offense under the Controlled Substances Act" is more "restrictive" than "felony punishable under the Controlled Substances Act." But the term "offense" includes misdemeanors, and thus is *less* restrictive than "felony." The common-sense reading of the statutory text is that when Congress wished to include state law offenses in section 924(c), it explicitly referred to them. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983).

C. The Government's Interpretation Creates A Conflict With The INA's Provision That A Single Offense Of Simple Possession Of Marijuana Is Not A Basis For Deportation.

The INA provides that "a single offense involving possession for one's own use of 30 grams or less of marijuana" is not a basis for deportation. 8 U.S.C. § 1227(a)(2)(B)(i). As Lopez's opening brief explains (pp. 28-29), this express provision undercuts the government's interpretation of Section 924(c). Under the government's interpretation, a first offense of simple possession of marijuana may be a basis for deportation. Not only that, it may be an aggravated felony that renders the individual ineligible for cancellation of removal or asylum.

The government's response, buried in a footnote (U.S. Br. 35 n.30), is unconvincing. The government acknowledges that it may be necessary for a court to

determine "whether the later enacted and specific personal-use exception . . . overrides the general language of the aggravated felony provision." U.S. Br. 36 n.30. The government overlooks the basic principle that statutes should be interpreted, whenever possible, to avoid such conflicts. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

The government tries to minimize the practical importance of this conflict, but courts avoid interpretations that create conflicts without determining their practical importance. *See id.* ("[C]ourts are not at liberty to pick and choose among congressional enactments."). Moreover, the conflict here appears to be of considerable practical importance. The government acknowledges that four States (including Florida) punish a first offense of possession of an ounce or less of marijuana as a felony. At least one additional State punishes possession of more than an ounce of marijuana as a felony. *See* Ga. Code Ann. §§ 16-13-2(b), 16-13-30(j). (Thirty grams is more than one ounce.) Although the government asserts that it is unaware of any case in which a noncitizen has been deported for a first offense of possession of 30 grams or less of marijuana, it does not state how thoroughly it has searched for such cases. Nor does it explain why it is appropriate for the Executive Branch to ignore an entire class of offenses that, in its view, Congress has defined as aggravated felonies.

The provisions of the INA, considered together, indicate that Congress established a graduated series of consequences for drug offenses: (i) no consequences for a first offense of simple possession of marijuana; (ii) deportation for most other simple possession offenses with the possibility of discretionary relief; and (iii) mandatory deportation, denial of asylum, and other

consequences for drug trafficking. Petitioner's interpretation fits this pattern; the government's interpretation does not.

D. The INA Does Not Alter The Definition Of "Drug Trafficking Crime" In Section 924(c).

The government argues that a simple possession offense may be an aggravated felony even if it is neither "illicit trafficking" nor a "drug trafficking crime" as defined in section 924(c). This argument departs from the plain text of the INA.

In support of its counter-intuitive argument, the government relies on the INA's provision that "[t]he term ['aggravated felony'] applies to an offense described in this paragraph whether in violation of Federal or State law" (or the law of a foreign country). 8 U.S.C. § 1101(a)(43). This provision cannot do the work the government wants it to do. It clearly provides that an "aggravated felony" must be "an offense described" in Paragraph (a)(43). For example, Paragraph (a)(43)(D) provides that "an offense described in section 1956 of Title 18 (relating to laundering of money instruments)" is an aggravated felony if the amount of the funds exceeds $10,000. A violation of state law is an aggravated felony so long as it is an "offense described" in Paragraph (a)(43)(D), *i.e.*, so long as it is money laundering under 18 U.S.C. § 1956. But state law cannot alter the *description* of the offense in Paragraph (a)(43)(D). If a State adopted an expanded definition of "money laundering," it would not alter the description of the offense in Paragraph (a)(43)(D).

Similarly, Paragraph (a)(43)(B) describes the offense of "illicit trafficking in a controlled substance . . . including a drug trafficking crime." The INA describes the "drug trafficking crime" offense by incorporating—in its entirety and without any change—the definition of "drug trafficking crime" in 18 U.S.C. § 924(c). Because that definition is limited to acts punishable as a felony

under the federal drug statutes, it cannot be altered or expanded by state law.

"Whether in violation of Federal or State law" serves an important function by specifying that a state-law conviction is an aggravated felony conviction if the conduct underlying the conviction violated a felony provision of the Controlled Substances Act. That language does not—and by its terms cannot—alter the description of "drug trafficking crime" to include conduct punishable as a misdemeanor under the Controlled Substances Act.

The government asserts (U.S. Br. 31) that "the question here is not the meaning of Section 924(c) standing alone . . . but rather as incorporated *mutatis mutandis*—that is, with all necessary changes having been made—into 8 U.S.C. § 1101(a)(43)." Because Congress expressly provided in the INA that an illicit trafficking includes a drug trafficking crime "*as defined in section 924(c) of title 18*," 8 U.S.C. § 1101(a)(43)(B) (emphasis added), the government's "*mutatis mutandis*" argument is refuted by the plain statutory language. This case is quite different from the two cases cited by the government. In *Shalala* v. *Illinois Council on Long-Term Care, Inc.*, 529 U.S. 1 (2000), and *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), the Court did not construe a statutory provision that used a term "as defined in" another provision. Moreover, the Court's interpretation in those cases was based on "specific evidence of Congress' intent," as well as on the Court's recognition that "a 'serious constitutional question' . . . would arise" if the statute were construed to deny judicial review of constitutional claims. *Illinois Council*, 529 U.S. at 16-17; *Michigan Academy*, 476 U.S. at 679-81 & n.12. No such considerations support the government's argument here.

II. The Legislative History Supports Petitioner's Reading Of The Statutory Text.

For the reasons set forth in Part I above and in Lopez's opening brief, the statutory text supports Lopez's interpretation rather than the government's. The government's contention that its current position is compelled by plain statutory language is particularly implausible in view of the fact that multiple courts have adopted Lopez's interpretation, as did the government itself for more than a decade. *See* U.S. Reply Br. in *Liao* v. *Rabbett*, 398 F.3d 389 (6th Cir. 2005) ("[T]he statutes here are ambiguous, as shown by the existence of the different potential readings cited in this case, as well as by the split in the circuits."); *see generally Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("in light of" conflicting lower court opinions, "it would be difficult indeed to contend" that statutory language is unambiguous).[7]

There is no dispute that the pre-1988 definition of "drug trafficking crime" ("any felony violation of federal law involving the distribution, manufacture, or importation of any controlled substance") was limited to federal crimes. *See Busic* v. *United States*, 446 U.S. 398, 414 (1980) ("A primary objective of § 924(c), as explained by its sponsor, Representative Poff, was to 'persuade the man who is tempted to commit a *Federal felony* to leave his gun at home.'" quoting 114 Cong. Rec. 22231 (1968)

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[7] The government incorrectly asserts that the lower courts adopting Petitioner's interpretation have relied solely on interpretive canons, such as the canon favoring uniformity in immigration law, rather than statutory language. *See, e.g.*, *Gonzales-Gomez*, 441 F.3d at 533 (government's interpretation "is a strained reading of the statutory language"); *Palacios-Suarez*, 418 F.3d at 698-99 (6th Cir. 2005) (carefully analyzing statutory language); *Gerbier* v. *Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (same).

(emphasis added)). The revised definition was adopted in a provision entitled "Clarification of Definition of Drug Trafficking Crimes." Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988). The purpose of the clarification, according to the Chairman of the Senate Judiciary Committee and a principal drafter of the amendment, was to make clear that "drug trafficking crime" includes "possession with intent to distribute," as well as "attempt and conspiracy violations." 134 Cong. Rec. S17,360, S17,363 (1988) (statement of Sen. Biden).

The government nevertheless argues that the 1988 amendment expanded the definition of "drug trafficking crime" to include state law felonies punishable as misdemeanors under the Controlled Substances Act. If Congress had intended such a significant change, it is likely there would have been some recognition of it. *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes.").

Nor does the government dispute that the 1998 amendments to section 101(a)(43) of the INA were intended to codify *In re Barrett*, 20 I. & N. Dec. 171, 177-78 (B.I.A. 1990), which held that the definition of "drug trafficking crime" "encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act." The government tries to dismiss this history on the ground that there is no affirmative statement that Congress intended to require that the state conviction be "analogous" to a federal offense. But Congress is presumed to know the law, *see Cannon* v. *University of Chicago*, 441 U.S. 677, 696-99 (1979), and it codified the decision in *Barrett* without indicating any disagreement with its requirement that the state offense must be "analogous" to an offense under the Controlled Substances Act. Moreover, subsequent BIA decisions expressly held that the offense must be analogous to a felony offense under that Act. *See, e.g., In re Davis*, 20 I.

& N. Dec. 536 (B.I.A. 1992). Thereafter, Congress amended the INA, including section 101(a)(43), but it never expressed disagreement with this position. *See Yanez-Garcia*, 23 I. & N. Dec. at 405 (Rosenberg & Espenoza, concurring in part and dissenting in part) ("[O]ur interpretation of § 924(c)(2) has been implicitly reaffirmed by Congress, which took no action in its comprehensive revisions of the Act in 1996 to amend section 101(a)(43)(B) of the Act or to alter our interpretation of that provision."). *See generally Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

III. Canons of Statutory Interpretation and Policy Considerations Support Petitioner's Interpretation.

Lopez's opening brief identifies a series of well-established principles of statutory interpretation that weigh in favor of Petitioners' interpretation: (i) immigration statutes are construed to ensure uniform treatment of immigrants, (ii) ambiguities in immigration statutes are resolved against deportation; (iii) federal criminal statutes are presumed to have a uniform meaning; and (iv) ambiguities in criminal statutes are resolved in favor of lenity. *See* Lopez Br. 33-38. The government's primary response—that these canons do not apply because its interpretation is required by the plain statutory language—is wrong for the reasons stated above.

a. The government acknowledges that uniform treatment of immigrants is desirable, and does not dispute that its interpretation produces striking non-uniformity. Under the government's interpretation, simple drug possession is an aggravated felony under

federal immigration law only in those States that choose to treat the offense as a felony.[8]

The government's only response is to assert that Lopez's interpretation also produces some non-uniformity, because some States punish trafficking offenses by imposing lengthy sentences for possession of large quantities of controlled substances, without expressly finding that the defendant manufactured or distributed drugs. The government argues that these individuals will escape treatment as aggravated felons under Lopez's interpretation.

The non-uniformity the government identifies is not comparable to the non-uniformity that results from its interpretation. First, States that punish possession of large amounts of controlled substances frequently give state prosecutors the option of charging defendants with a drug trafficking offense.[9] Second, when an individual has been convicted of possession of a large quantity of illegal drugs, it may be possible to ascertain from the indictment or jury instructions that the defendant was found to have engaged in manufacturing or distribution, or intended to

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[8] The government argues (U.S. Br. 47) that the Uniformity Clause of the Constitution applies only to "standards for citizenship." Whether or not that is so, this case does concern standards for citizenship. One of the requirements for naturalization is that the person must be "of good moral character." 8 U.S.C. § 1427(a)(3). Congress has specifically provided that no person who has been convicted of an aggravated felony may be found to be of good moral character. *Id.* § 1101(f)(8).

[9] *See* Alaska Stat. § 11.71.030(a)(1) (possession with intent to manufacture or deliver); Ariz. Rev. Stat. Ann. § 13-3408(A)(2) (possession for sale); Del. Code Ann. tit. 16, § 4751(a) (possession with intent to manufacture or deliver); La. Rev. Stat. Ann. § 40:967 (possession with intent to distribute); Miss Code Ann. § 41-29-139(a)(1) (possession with intent to distribute); Tex. Health & Safety Code Ann. § 481.112(a) (possession with intent to deliver).

do so. *See Shepard* v. *United States*, 544 U.S. 13 (2005); *Taylor* v. *United States*, 495 U.S. 575 (1990). Third, *any* drug conviction (other than a single offense involving possession of 30 grams or less of marijuana) is a basis for deportation. 8 U.S.C. § 1227(a)(2)(B)(i). In deciding whether to grant discretionary cancellation of removal, the immigration judge can decline to grant relief to individuals who appear to have engaged in trafficking offenses. In contrast, the government has no discretion to achieve uniformity by granting relief to individuals convicted of aggravated felonies. *See* Lopez Br. 3-4; Asian American Justice Center Br. 11-26.

b. This Court's decisions applying the rule of lenity have not generally required a "grievous" ambiguity, *e.g.*, *Castillio* v. *United States*, 530 U.S. 120, 131 (2000) (Court need only be "genuinely uncertain as to Congress' intent"), but Petitioner is entitled to the benefit of the rule under any formulation. The government argues that Lopez's interpretation is more lenient to some individuals (those convicted of state felonies that are federal misdemeanors) but less lenient to others (those convicted of state misdemeanors that are federal felonies). This goes to the immigration consequences of an aggravated felony conviction, but the rule of lenity is a criminal law doctrine that applies to the interpretation of the criminal statute at issue in this case—section 924(c) of Title 18. Lopez's interpretation is more lenient to criminal defendants. There is no ambiguity about whether the word "felony" in section 924(c) includes federal felonies, but only whether "felony" also includes state law felonies punishable as federal misdemeanors.[10]

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[10] The American Bar Association describes the difficulties that arise if a state misdemeanor conviction is deemed to be an aggravated felony conviction for immigration law purposes. ABA Br. 14-24. That issue, which is not before the Court in this case, is not confined to "drug (continued...)

The government objects to a "heads-I-win, tails-you-lose" approach to interpreting the aggravated felony provisions, but it has taken exactly that approach. As the Seventh Circuit recently remarked, the "only consistency" that can be discerned "in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzales-Gomez*, 441 F.3d at 535. The government has argued that "whether a particular offense constitutes 'sexual abuse of a minor' for purposes of classification as an aggravated felony is a matter of federal law rather than state law." *Id.* It has argued—contrary to its position here—that a state drug possession offense is an aggravated felony if it is classified as a felony by the State, even where the maximum sentence is probation. *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002). *See also Liao* v. *Rabbett*, 398 F.3d at 390 (same). And it has argued that a state misdemeanor drug offense is an aggravated felony if punishable by more than a year. *United States* v. *Amaya-Portillo*, 423 F.3d 427, 432 (4th Cir. 2005).

c. The government's assertion (U.S. Br. 32) that Lopez's interpretation of the statute is "unworkable" is incorrect. The BIA adopted and used Lopez's interpretation for 12 years, and it remains in use in five circuits. *See* Lopez Br. at 8. If the interpretation were "unworkable" it would have broken down long ago. Contrary to the government's assertion, the BIA did not abandon its prior interpretation as "unworkable." Instead, the Board determined that "uniformity is presently unattainable" because of the split in the circuits, and concluded that "the best approach is one of

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trafficking" aggravated felonies, but arises with respect to numerous other categories of aggravated felonies defined by reference to specific provisions of federal law. *See* 8 U.S.C. § 1101(a)(43)(D), (E), (H), (I), (J), (K), (L), (N), (O), (P).

deference to applicable circuit authority." *Yanez-Garcia*, 23 I. & N. Dec. at 395-96. The Board noted, as an additional reason for changing course, that the federal felony approach presents some "analytical difficulties," but that is far from finding the approach unworkable. *See id.* at 405 (Rosenberg & Espenoza, concurring in part and dissenting in part) (government's prior interpretation "has been applied to literally thousands of cases"). Some "analytical difficulties" are inevitable when state offenses must be compared to federal offenses. *See, e.g., Taylor*, 495 U.S. at 595-602 (adopting a uniform federal definition of "burglary" under 18 U.S.C. § 924(e)). Indeed, the governments' amici note that most States use an analog to the federal felony approach to sentence recidivists. *See* Br. of Texas, *et al.* at 11.

Conclusion

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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